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Supreme Court, U.S.
FILED

021380 FEB 14 2003

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No.

**IN THE**

**Supreme Court of the United States**

OCTOBER TERM, 2002

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ROBERT C. FOSTER and ANN I. FOSTER
**Petitioners,**

v.

MARITRANS, INC., MARITRANS G.P., INC., and
MARITRANS OPERATING PARTNERS, L.P.
**Respondent.**

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**On Petition for a Writ of Certiorari**
**To The Superior Court of Pennsylvania**

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Under controlling federal maritime law, can an appellate court vacate a jury's factual finding of unseaworthiness and rule, instead, that as a matter of substantive maritime law, ice on the deck of a vessel under way in winter weather conditions cannot render a vessel unseaworthy when the seaman has presented evidence that the ice could and should have been treated so as to render the deck reasonably fit for the safety of the crew member walking across the deck?

2. Does the decision of the Superior Court of Pennsylvania, holding that as matter of substantive maritime law, the presence of ice on the deck of a vessel under way in freezing weather can never render the vessel unseaworthy, conflict with controlling federal maritime law and principles, such that the decision must be reversed to prevent compromising the safety of all crew members who are compelled to work in icy deck conditions?

## PARTIES TO THE PROCEEDINGS

Petitioners, Robert C. Foster and Ann I. Foster, his wife, were the Plaintiffs and Appellees in the courts below. Respondent was the Defendant and Appellant in the courts below.

All parties appear in the caption of the case on the cover page.

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## PETITION FOR A WRIT OF CERTIORARI

Robert C. Foster and Ann I. Foster, petition for a Writ of Certiorari, to review the judgment of the Superior Court of Pennsylvania.

## OPINIONS BELOW

The Opinion of the highest state court to review the merits is the decision of the Pennsylvania Superior Court of January 9, 2002, and appears at Appendix "A" to this Petition. The decision is officially reported at 790 A.2d 328 (Pa.Super. 2002).

The Order of November 20, 2002 of the Pennsylvania Supreme Court denying the Petition for Allowance of Appeal to that Court, appears at Appendix "B" to the Petition. That Order has not yet been officially reported.

All the opinions below are reproduced in the Appendix.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a). On November 20, 2002, the Pennsylvania Supreme Court entered an Order denying the Petition for Allowance of Appeal from the Decision and Order of the Superior Court of Pennsylvania entered on January 9, 2002. A copy of the Order of the Supreme Court of Pennsylvania of November 20, 2002 appears at Appendix "B".

No petition for rehearing or reargument was filed.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides that:

Section 2.

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; -to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming lands under grants of different States, and between a State, or Citizens thereof, and foreign States, Citizens, or Subjects.

28 U.S.C. §1257(a) provides that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

46 U.S.C. §688 provides that:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

## STATEMENT OF THE CASE

This is a maritime case brought in the state courts of Pennsylvania pursuant to the Jones Act, 46 USC §688 and general maritime law. Petitioner, Robert C. Foster, is a seaman who brought an action in the Court of Common Pleas of Philadelphia County to recover for personal injuries he sustained when he slipped and fell on ice located on the deck of a tugboat that was proceeding up the Delaware River. A jury returned a verdict in favor of the Petitioner, finding that the vessel was unseaworthy. The jury returned a verdict for the vessel on the issue of negligence under the Jones Act. That finding was not appealed. The issue of maintenance and cure for the seaman was decided by the trial court and is not involved in this appeal.

This case involves an aberrant and unique instance in maritime law. An appellate court has vacated a jury's factual determination in favor of the seaman, which found the vessel unseaworthy, and has directed the entry of a judgment not withstanding the verdict (JNOV) in favor of the vessel, despite ample evidence supporting the jury's determination.

**Decision in the Trial Court**

Viewing the trial evidence and drawing all inferences therefrom and resolving all conflicts in the light most favorable to Petitioner, as the verdict winner, the following facts are established by the jury's verdict: On February 29, 1996, Maritrans' Tugboat the "Diplomat" was towing a barge up the Delaware River. (N.T. April 24, 2000: 32) Robert Foster was employed in the service of the vessel as the Assistant Engineer. (Id. 33) At approximately 6:00 P.M., which would be the end of his six-hour watch, Mr. Foster was ordered by his immediate superior, Chief Engineer Billy Sawyer, to proceed from his usual station in the engine room below deck, outside onto the tow winch deck area. (April 24, 2000: 34, 37-38) Mr. Foster was to assist in checking the level of the fuel tanks in preparation for the end of the month fuel reports. (N.T. April 27, 2000: 18)

Petitioner had last been on deck around 1:00 P.M., or approximately five hours before he fell. (N.T. April 24, 2000: 36)

There was no ice at that time. Thereafter, he had been in the engine room and was unaware of what was happening on deck. (Id.: 34-35) He was not informed of any danger on the deck (N.T. April 24, 2000: 41, 54), although he had announced that he was going on deck in accordance with usual safety practices. (Id.: 39, 141)

Mr. Foster exited through a doorway in a rear-facing solid steel bulkhead (wall), and slipped and fell on a thin sheet of ice. (N.T. April 24, 2000: 53-54)

The Petitioner's liability expert testified, by videotape, that icy conditions aboard the Diplomat were hazardous and that it was common procedure during winter months to apply ice melt to such hazardous conditions. (N.T. Skye Video Dep.: 64)

In fact, Chief Engineer Sawyer also stated in his deposition that it was standard operating procedure for the crew of the Diplomat to apply ice melt to ice found on the vessel. (N.T. April 27, 2000: 28)

Most importantly, the evidence refuted any contention that weather conditions prevented the successful de-icing. Even the testimony of defense witness, First Mate Michael Lynch, and the initial accident report to the company showed that the area where the Petitioner fell was "salted" successfully after the incident. (N.T. April 26, 2000: 152) (Or more precisely, that "ice melt" was applied). Ice melt was successfully applied after the Petitioner fell and at a time when the vessel was still "under way" in the same sea and weather conditions. (N.T. Skye Dep.: 31) Those conditions presented "little wind" and "calm seas." (N.T. April 24, 2000: 37; 65)

The Petitioner's expert witness also refuted the assertion that the ice found on the vessel could not have been treated. He testified that ice melt would <u>not</u> be washed off because the ice melt would "pit" or put holes into the ice and be caught in the ice itself. The ice melt would, thus, be buried or trapped in the small holes of the ice, which the ice melt would create. If the salt was washed off, the ice would be washed off along with it. (N.T. Skye Dep.: 85-89) Additionally, once ice melt is applied, it makes holes or pits or roughs up the surface, and therefore the surface is no longer smooth. (N.T. Skye Dep.: 89)

Thus, there is no basis on the evidence presented of record at this trial for the Superior Court's pronouncement that ice on the deck of the Diplomat was "unavoidable" and "inevitable," or that, "as a practical matter," it would be impossible to maintain an ice free deck while operating at sea in freezing weather. (Opinion, p. 7, 790 A.2d at 333) The evidence presented at this trial, thus, factually refutes the assertion that ice on the deck of the Diplomat was "unavoidable" or "inevitable", or that, "as a practical matter," it would have been impossible to maintain an ice free deck while operating in the prevailing conditions.

**Decision on Appeal to the Pennsylvania Superior Court**

The Respondent, on appeal to the Superior Court, raised several issues, one of which was the contention that ice on deck was insufficient, as a matter of law, to constitute an unseaworthy condition. Petitioner argued that the evidence was sufficient and that, under federal maritime law, an appellate court was foreclosed from reviewing the jury's verdict of unseaworthiness when that verdict was supported by evidence such as existed in this case.

The Pennsylvania Superior Court, without citation to any authority, engaged in an independent evaluation and analysis of the case and reversed the jury's finding in favor of the seaman. The Superior Court wrote:

> What is currently in dispute is whether the deck on which Foster slipped was reasonably fit for its intended use, as he essentially alleges that the ice which formed on the deck, rendered it incapable of functioning in the manner in which it was designed. Maritrans does not dispute that there was ice on the tug's deck, but, rather, argues that ice is a condition which commonly occurs on the decks of vehicles [sic] underway in freezing weather, and that the presence of such ice does not automatically render a vessel unseaworthy. We agree.790 A.2d 328, 332(Pa.Super. 2002).

The Superior Court reasoned that it was not practical or possible to maintain an ice-free deck while operating at sea in freezing weather

since the slightest ocean spray can create ice on deck, and, therefore, Petitioner had failed to prove that the presence of ice on the tug's deck rendered it unseaworthy. 790 A.2d at 333.

The Petitioner requested leave to appeal to the Supreme Court of Pennsylvania. On November 20, 2002, the Supreme Court of Pennsylvania denied leave to appeal, without opinion and without elaboration.

## REASONS FOR GRANTING THE PETITION

The Superior Court of Pennsylvania has ruled on an important issue of federal maritime law in a manner that conflicts with relevant decisions of this court and other federal courts. The Superior Court has reversed a jury's verdict that a vessel was unseaworthy, when the verdict was amply supported by the evidence, in violation of this Court's standard that a finding of unseaworthiness is a factual finding with which a court may not interfere.

The first question is an important procedural one: In what circumstances, if any, can an appellate court reverse a jury's factual determination that a vessel is unseaworthy? The resolution of this question involves a determination that will be important to maritime law and to the control of all courts, state or federal, sitting in maritime cases.

But there is also a vital substantive question with far ranging implications for all mariners. This is not simply an instance of a court misapplying the law or misconstruing the evidence affecting only one particular case. For the Superior Court has pronounced, as a controlling principle of federal maritime law for all cases, that it would be impossible to maintain an ice-free deck while operating at sea, where there is a spray and where there is freezing weather. Under this holding, a jury cannot find that the presence of ice may constitute a defect or condition rendering the vessel not reasonably fit and unseaworthy. The question is of vital concern to all seamen who must work in icy, wintry conditions.

This substantive question has not been specifically addressed by this Court, and the Superior Court's decision is in conflict with federal cases that leave it to the jury to decide if any icy deck renders the vessel unseaworthy. This conflict has the very real potential of leading to conflicting outcomes, which would result when a case is tried in the state courts of, for example, Pennsylvania, as opposed to the federal courts of the various districts of that state. This Court's off-repeated emphasis on the need for uniformity in maritime law compels this Court to reverse the Pennsylvania Superior Court.

## I. The Pennsylvania Superior Court Erred In Disregarding The Evidence Presented And In Vacating The Jury's Factual Determination Of Unseaworthiness.

The Superior Court mistakenly held, as a matter of federal maritime law, that the jury could not find that ice on the deck of the vessel could render the vessel unseaworthy, despite the evidence presented at trial that the ice could and should have been treated or removed, and that the vessel could have been rendered reasonably fit for the safety of the crew. Procedurally, the decision of the Superior Court cannot be allowed to stand and must be reversed, for, in disregarding the Petitioners' evidence, the Superior Court violated the fundamental federal maritime principle that unseaworthiness is a factual question which must be left solely for the jury to resolve. The manner by which the Superior Court reached its decision and the substance of its holding, presents serious, important, and irreconcilable conflicts with controlling federal maritime law as pronounced by the decisions of this Court and the lower federal courts.

Because the determination of unseaworthiness is a factual determination, an appellate court cannot reverse this jury's factual determination of unseaworthiness due to icy deck conditions and grant judgment notwithstanding the verdict (or JNOV) in favor of the vessel. An appellate court may not reverse a jury's factual determination of unseaworthiness and may not rule, as a matter of law, that a jury could not find the vessel unseaworthy where the seaman presents the "slightest" evidence of unseaworthiness. Here, this seaman presented ample evidence of unseaworthiness.

### A. Maritime law, both substantive and procedural, is controlled by Federal Law.

It is well settled that the entire body of maritime law, substantive and procedural, is controlled by federal law, which must be applied and followed by a state court hearing a maritime case. Garrett v. Moore-McCormack, 317 U.S. 239 (1942) (holding that the Pennsylvania state courts must act in manner conforming to admiralty practice, so that the Pennsylvania courts improperly

applied a Pennsylvania rule which required a seaman to sustain the burden of proving the invalidity of the release, whereas federal maritime law required the defendant to sustain a release). See also Kermarec v. Compagnia Generale Transatlantique, 358 U.S. 625 (1959). Even the Pennsylvania Supreme Court has long recognized that the entire subject of maritime law, substantive and procedural, is subject to federal control. In re Escheat of Moneys, etc. in U.S. Dist. Ct., 358 Pa. 133, 136, 57 A.2d 256 (1948).

Pursuant to these principles, federal law determines the quantum of evidence the plaintiff needs to introduce to establish unseaworthiness. While the burden of proof of unseaworthiness is on the seaman, that burden is characterized as "very light" or "slight". Thus, if it is determined by the "barest margin" that the condition was not reasonably fit to permit the seaman to perform his task aboard the tug with reasonable safety, the plaintiff has met his "very light" burden of proof of establishing unseaworthiness. Baczor v. Atlantic Richfield Co., 424 F.Supp 1376 (E.D. Pa. 1976); Burden v. Evansville Materials Inc., 636 F.Supp. 1022, 1029 (W.D. Ky. 1986); aff'd 840 F.2d 343, 348 (6th Cir. 1988).

### B. Unseaworthiness is a factual determination that must be left to the jury.

Federal maritime law is also clear that what constitutes an unseaworthy condition is a question of fact solely for the jury to determine. Because unseaworthiness is a question of fact for the jury, when there is evidence that a condition could be made safe, and should have been made safe, and that the condition caused the injury, the evaluation of that evidence should be for the jury alone. The Superior Court may not usurp the jury's function and may not rule as a matter of law to enter Judgment NOV in favor of the vessel on the basis that the vessel could not have been found to be unseaworthy.

The federal courts have consistently held that, as to the ultimate determination of unseaworthiness, the presiding judge cannot and will not usurp or upset the jury's factual determination. Thus, in Waldron v. Moore McCormick Lines, Inc., 386 U.S. 724 (1967), this Court held that it was reversible error for the trial court

to direct the verdict for the defendant/vessel on the issue of unseaworthiness, for the issue of what constitutes unseaworthiness is a factual question for the jury, which has to be presented to and resolved by the jury.

Following the mandate of this Court, the circuit courts have repeatedly applied the rule that the condition of unseaworthiness is a question of fact generally not appropriate to be resolved as a matter of law. Cook v. American S.S. Co., 53 F.3d 733, 742 (6th Cir. 1995); Siderewicz v. Enso-Gutzeit O/Y, 453 F.2d 1094 (2nd Cir. 1972). By its ruling in this case, the Pennsylvania Superior Court is in conflict with this essential controlling federal maritime principle.

In addition, the district courts for the Eastern District of Pennsylvania have likewise denied motions for Judgment NOV (and in the alternative for a new trial) when the jury found for plaintiff on both unseaworthiness and negligence. Neidlinger v. Victory Carriers, Inc., 365 F.Supp. 1376, 1377, (E.D. Pa. 1973); Laughlin v. Eastern Engineering Co., 218 F.Supp. 380 (E.D. Pa. 1963). The Third Circuit has affirmed the pronouncement that a court is not free to set aside the jury's verdict merely because it believes that the jury could have made a different conclusion or because the court believes a different result is more appropriate. McLeod v. Union Barge Lines, Inc., 95 F.Supp. 366, 369 (W.D. Pa. 1951); aff'd 189 F.2d 610 (3rd Cir. 1951).

The decision of the Superior Court to reverse the jury's factual determination has no support in any other case. The Superior Court has not cited any cases where an appellate court has reversed a jury's factual determination of unseaworthiness, because of an icy deck, entered in favor of the seaman and against the vessel, and where the court has then gone on to grant judgment notwithstanding the jury's verdict in favor of the defendant vessel on the ground that, as a matter of law, the jury could not have found the vessel unseaworthy.

The Superior Court's decision, therefore, conflicts with substantive maritime law as well as the procedural standards for appellate review of a jury's determination of unseaworthiness. The Superior Court's decision did not address or mention the federal standards, which require that a jury's verdict remain undisturbed

unless the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict. See Caldwell v. Solus Ocean Systems, Inc., 734 F.2d 1110, 1120 (5th Cir. 1984).

### C. The Jury's determination of unseaworthiness was reasonable.

In the present case, the jury's determination that a vessel was unseaworthy because of the ice on deck was a reasonable one, which was properly made, as shown by other federal cases.

For example, Oxley v. City of New York, 923 F.2d. 22 (2nd Cir. 1991)involved a police officer assigned as an engineer on board a New York City Police Department Harbor Unit Launch involved in transporting correction officers within New York Harbor (Oxley was a seaman). There was bad weather, involving "strong winds", mixed rain and snow, a temperature of 22° F, with ice forming on deck. A make-shift, under-deck heating system was apparently not functioning and there was no salt or sand on board. When one of the correction officers jumped on board from the dock (there were other deficiencies preventing a more secure docking and boarding), the officer fell on the ice and into Oxley, causing Oxley to sustain an injury. The Court of Appeals reversed the district court's grant of Summary Judgment in favor of the defendant vessel, holding that Oxley's claim of unseaworthiness, based in part on an icy deck, had to be resolved by a jury at trial. 923 F.2d at 26. Oxley is a conflicting pronouncement of federal maritime law and demonstrates that, even though ice may form on the deck of a vessel transiting a harbor, the vessel may be found by a jury to be unseaworthy if that icy condition of the deck is not attended to. It is both substantively and procedurally in conflict.

In Kline v. Maritrans, Inc. another federal court has left the determination of unseaworthiness, due to icy conditions, to the jury. 791 F.Supp. 455 (D. Dela 1992). The Kline court denied the vessel's Motion for Summary Judgment as a matter of law and found that the testimony of record would permit a reasonable fact finder to find that a vessel was unseaworthy in a situation where

men frequented a spot to urinate over the side of the vessel, where there was ice at the spot and the guardrail was down, and where the plaintiff-decedent, while urinating, slipped on the ice and fell overboard to his death.

These decisions show that the verdict of the jury in the present case could not be found to have been unreasonable. It is a verdict which these other opinions would surely permit a jury to make. Thus, the decision of the Pennsylvania Superior Court is in conflict with these federal court decisions leaving the determination of unseaworthiness, due to an icy deck, to the jury.

Such conflicts call for the court to review the decision of the Superior Court in order to preclude differing standards of review for cases tried in a state court, and cases tried in a federal district court sitting in that same state.

## II. Where There Is Evidence That Ice On Deck Could Have Been Treated In The Prevailing Weather Conditions, And Where The Ice Was In Fact Treated After The Seaman's Fall, A Jury May Properly Conclude As A Matter Of Substantive Maritime Law, That The Icy Deck Conditions Rendered The Vessel Unseaworthy.

In addition to the procedural irregularities, this Court should grant certiorari to review the substantive declaration of the Superior Court. The Superior Court's decision is a pronouncement that as a matter of substantive maritime law, ice is a condition that commonly occurs on the decks of vessels under way in freezing weather, and, as a matter of law, it is impossible to maintain an ice-free deck while operating at sea in freezing weather when the slightest ocean spray can lead to ice on deck. This decision ignores the evidence presented at this trial that refutes the contention that treating the ice was impossible or impractical.

But this is more than a mere error affecting just this case. If not reversed, the decision of the Superior Court would permit a vessel to ignore its safety duties to its seamen. A vessel would not even have to try to clear the ice. For if a fall occurs, the vessel could always maintain that, as a matter of law, the ice and the fall were "unavoidable." This result is clearly in violation of the doctrine of

unseaworthiness as pronounced by this court.

### A. Under maritime law, a ship owner has a legal duty to provide its seamen with a seaworthy vessel.

It has been well-established since the middle ages that a seaman is "emphatically the ward of the admiralty." Chandris, Inc. v. Latrsis, 515 U.S. 347, 354 (1995). The seaman's status as a ward of the admiralty has led to the development of the unique and special body of maritime law. Admiralty law includes a host of special rights, duties, rules and procedures. Lewis v. Lewis and Clark Marine, Inc., 531 U.S. 438 (2001). One of those special and extraordinary remedies is the doctrine of unseaworthiness.

Under the general maritime law, a ship owner is under a legal duty to furnish its seamen with a seaworthy ship or one that is reasonably fit for the purpose intended. This duty was first announced in The Osceola, 189 U.S. 158 (1903). This duty is a species of liability without fault, and it is non-delegable. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). Unseaworthiness does not depend on a finding of negligence. Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944); Alaska Steamship Co. v. Petterson, 347 U.S. 396 (1954). It can be found even when there is a jury finding that the vessel owner was not negligent. Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724 (1967). It can be found in transitory conditions that did not exist long enough for the vessel owner to have actual or constructive notice. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

As stated by this Court in Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 498 (1971):

> Liability based upon unseaworthiness is wholly distinct from liability based upon negligence. The reason, of course, is that unseaworthiness is a condition, how that condition came into being - whether by negligence or otherwise is quite irrelevant to the owner's liability for the personal

injuries resulting from it.

While the duty to furnish a seaworthy vessel is absolute, the scope of that duty, with the proper application of the unseaworthiness doctrine provides that "all things aboard a ship [including] the decks, the machinery, [or] the tools furnished...must be reasonably fit for the purpose for which they are to be used." Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 (1963). This Court, therefore, has specifically recognized that decks are included among those items of a ship that must be rendered reasonably fit for a crewman to use.

**B. A vessel is rendered unseaworthy when ice that could have been treated and/or removed but, in fact, was not.**

This Court has not specifically decided whether an icy deck in wintry conditions may be held to constitute a condition which is not reasonably fit for the safety of the crew and, therefore, unseaworthy. As shown above, several lower federal courts have left the decision to the jury. This is as it should be for the resolution of the question will depend on many variables.

It should be emphasized that Petitioners are not arguing, as the Pennsylvania Superior Court wrote, that the presence of ice automatically renders a vessel unseaworthy. See 790 A.2d at 332. There may be conditions that are so severe and overwhelming that the ice cannot be removed.

The substantive question before this Court, however, is whether the jury may find the vessel unseaworthy where there is evidence that ice could have been treated in the prevailing weather conditions; or whether, as a matter of law, such conditions are always inevitable, unavoidable, and impossible to correct.

Aside from the decision in this present case, no court appears to have chosen the second alternative, and the Superior Court made its choice without citation to any relevant precedent.

While the Superior Court referenced several cases, the Superior Court misapplied and misconstrued the cases it cited. The Superior Court was absolutely mistaken in the assertion that other courts have held that ice on deck cannot constitute unseaworthiness

as a matter of law. The Superior Court's citation to the cases of Connorton v. Harbor Towing Corporation, 237 F.Supp. 63 (D. Md. 1964), aff'd 352 F.2d 517 (4th Cir. 1965); Tate v. A/B Svenska Amerika Linein, 331 F.Supp. 854 (E.D. La. 1970); and Pappas v. Potomac Party Cruises, Inc., 2000 U.S. App. Lexis 12443 (4th Cir. 2000) are completely irrelevant for they do not in any way support the assertion made by the Superior Court.

Those cases were instances where a federal trial court, sitting without a jury and acting as a sole fact finder, made a factual determination on the evidence presented at those trials. Because of the vastly different evidence presented at this trial, those cases have no precedential value to the present case. More importantly, none of those cases involved a reversal of the jury's factual determination of unseaworthiness.

For example, the court in Connorton v. Harbor Towing Corporation, involved a trial judge sitting as a sole fact finder. That opinion was an announcement of that judge's factual determination based on the evidence introduced at trial, that it would not have been practical or possible to maintain an ice free deck because the salt would have washed off by the very "spray" which caused the ice. 237 F. Supp. 63 (D. Md. 1964). (In addition, the seaworthiness issue was not ever discussed in the Fourth Circuit Opinion). The evidence in Petitioner's case was vastly different. The expert testified that the ice melt would not wash off, but would instead form pits within the ice, be trapped within those pits, and at the very least create a rough surface which would reduce the slipperiness.

The Tate case involved a "wet deck surface", which is vastly different from an icy deck. Moreover, Petitioners have made no assertion that mere wetness would be sufficient to establish an unseaworthy condition.

Especially disturbing was the Superior Court's citation to Pappas v. Potomac Party Cruises, Inc. That case does not deal at all with ice or ice on deck. More significantly, Pappas is an unpublished opinion. See 215 F.3d 1320. Under the rules of the Fourth Circuit, unpublished opinions are not to be cited as precedent. Rule 36(a) and Rule 36(b) FRAP 4th Cir. Thus, these cases are not authority for the principle announced by the Pennsylvania Superior Court in the present case.

It falls to this Court to ultimately declare the general maritime law. The guiding principle of that law is to maximize the safety and welfare of all seamen. And to maximize the safety and welfare of its wards the doctrine of unseaworthiness has been given the most expansive application.

If the decision in the present case is not reversed, those overriding and vital concerns for the safety of seamen will be effectively abrogated with regard to icy decks. The Superior Court's decision will create a precedent that will affect the safety of all seamen who are compelled to work on an icy deck. If the decision is not reversed, no vessel will be obligated to even attempt to clear an icy deck, for the vessel can always argue that as a matter of law, an icy deck can never be treated. Any vessel can make this argument using this case as authority in federal and state courts.

Only this Court can correct the serious threat that this decision represents to the safety of every seaman. This Court must make a clear and emphatic pronouncement that the doctrine of unseaworthiness requires that a vessel do whatever it can reasonably do to treat an icy deck and render it safe for the crew. This Court must make a clear and emphatic pronouncement that if a deck is left untreated and icy, that condition may be found by the jury to render the vessel unseaworthy.

This court's review is therefore necessary to resolve the conflicts created by the Superior Court's decision to correct a gross aberration of federal maritime law by a state court sitting in admiralty, and to insure that the rights of seamen, as afforded by federal maritime law, are properly protected and vindicated in whatever forum the case is litigated.

## CONCLUSION

For the forgoing reasons, Petitioners respectfully request this Court to issue a Writ of Certiorari to review the decision of the Superior Court of Pennsylvania.

DuBOIS, SHEEHAN, HAMILTON & LEVIN

BY: _____
JAMES D. HAMILTON, JR., ESQUIRE

FINE AND STAUD

BY: _____
LOUIS A. PEREZ, JR., ESQUIRE
ATTORNEYS FOR PETITIONERS
ROBERT C. FOSTER & ANN I. FOSTER

**Appendix "A"**

J-A23012-01

2002 PA Super 4

| | | |
|---|---|---|
| ROBERT C. FOSTER AND ANN I, FOSTER, his wife | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| Appellees | : | |
| v. | : | |
| MARITRANS, INC., MARITRANS GP, INC. AND MARITRANS OPERATING PARTNERS, L.P., | : | |
| Appellants. | : | No. 240 EDA 2001 |

Appeal from the Judgment entered December 11, 200 In the Court of Common Pleas of Philadelphia County
Civil No. 001070 – February Term, 1998
Filed: January 9, 2002

BEFORE: HUDOCK, STEVENS, and POPOVICH, JJ

Maritrans Operating Partners, L.P. (Maritrans) appeals from a December 11, 2000 judgment in favor of Robert and Ann Foster.

The record before us reveals that Robert Foster was employed as a merchant seaman on February 29, 1995, when he slipped and fell on the icy deck of a tugboat owned and operated by Maritrans. On February 6, 1998, Foster and his wife filed a civil action against Maritrans, alleging that Maritrans was negligent under the Jones Act, 46 U.S.C. § 688 et seq.,[1] and that the tugboat was unseaworthy under general maritime law.

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[1] The courts of this Commonwealth have concurrent jurisdiction with the federal courts to try actions brought under traditional maritime law. Richards v. Dravo Corp., 375 A.2d 750, 752 (Pa.Super. 1977). "[T]he Jones Act extends the rights of seamen to sue for injuries resulting from the shipowner's negligence. The Act

On May 2, 2000, a jury found that although Maritrans was not negligent, the tugboat was unseaworthy, and that such a condition caused Foster's fall and resulting injury, for which he was entitled to one million eight hundred thousand dollars ($1,800,000.00) in damages. The parties agreed to bifurcate the issue of maintenance and cure, therefore the jury did not address that issue. Maritrans filed post-trial motions on May 11, 2000, which were denied by the trial court on September 18, 2000. The following day, judgment was entered on the verdict, but on September 26, 2000, judgment was vacated pending final decision of the court on outstanding claims. On November 28, 2000, the trial court issued a memorandum and order addressing the issue of maintenance and cure, awarding Foster $33,630.34.[2] Thereafter, on December 11, 2000, judgment was entered on the May 2, 2000 jury verdict and the November 28, 2000 order of the trial court.

Maritrans filed the instant appeal on January 9, 2002, raising four allegations of error. It first argues that the trial court erred in failing to enter judgment notwithstanding the verdict where the evidence showed only that Foster slipped on naturally occurring ice on the deck of a vessel in transit, which does not represent an unseaworthy condition as a matter of law.

> Our scope of review with respect to whether JNOV is appropriate is plenary, as with any review of questions of law. Phillips v. A-Best Products Co., 542 Pa. 124, 665 A.2d 1167, 1170 (Pa. 1995). It is axiomatic that, "there are two bases upon which a judgment n.o.v. can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant." Moure v. Raeuchle, 529 Pa. 394, 604 A.2d 1003, 1007 (Pa. 1992) (citations omitted). To uphold JNOV on the first basis, we must review the

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provides that rules of liability established under the Federal Employer's Liability Act will apply in such an action." Id. at 752 n.1.

[2] This ruling is not a subject of the instant appeal. Appellant's brief at 5, n.1.

> record and conclude "that even with all the factual inferences decided adverse to the movant the law nonetheless requires a verdict in his favor, whereas with the second [we] review the evidentiary record and [conclude] that the evidence was such that a verdict for the movant was beyond peradventure." Id.
>
> When we review a motion for JNOV, we must consider the evidence in the light most favorable to the verdict winner, who must receive "the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor." Id. (citing Broxie v. Household Finance Co., 472 Pa. 373, 372 A.2d 741, 745 (Pa. 1977)). Any doubts must be resolved in favor of the verdict winner, and JNOV should only be entered in a clear case. Id. Finally, "a judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury, but on the facts as they come through the sieve of the jury's deliberations." Id. (citing Brown v. Shirks Motor Express, 393 Pa. 367, 143 A.2d 374, 379 (Pa. 1958)).

Rohm & Haas Co. v. Continental Cas. Co., 781 A.2d 1172, 1176 (Pa. 2001). Reviewing the evidence before us under the above standard, we find that Maritrans is entitled to judgment notwithstanding the verdict.

Foster testified that there was no ice on the deck in the hours before his fall, but that some water can get on deck, and freeze, as a result of spray when a vessel is underway, and that on the day in question "somehow water got on the deck" before his fall. N.T. 4/24/00 at 138-140. In addition, Foster's expert witness testified that it is typical for a vessel underway to have its deck awash. 3/1/00 Deposition of William Skye, at 64. Maritrans argues that this evidence shows only that Foster slipped on naturally occurring ice on the deck of a vehicle in transit and that

such evidence is insufficient to establish that the vessel was unseaworthy under maritime law.[3]

The doctrine of unseaworthiness involves liability without fault. Newman v. Consolidation Coal, Co. 652 A.2d 415 (Pa.Super. 1994). "Under federal law, a ship owner is strictly liable for failing to furnish a seaworthy ship. Liability for failing to provide a seaworthy ship arises independent of any duty to exercise reasonable care." Klineburger, 591 A.2d at 315-316 (citations omitted). "A ship owner has an absolute duty to furnish a seaworthy ship." Pappas v. Potomac Party Cruises, Inc. 2000 U.S. App. Lexis 12443, at *12-13 (4th Cir. June 6, 2000) (citing Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960)).

To establish a claim for unseaworthiness, Foster must establish: "(1) the warranty of seaworthiness extended to him and his duties; (2) his injury was caused by a piece of the ship's equipment of an appurtenant appliance; (3) the equipment used was not reasonably fit for its intended use; and (4) the unseaworthy condition proximately caused his injuries." Rizbitski v. Canmar Reading & Bates, 111 F.3d 658, 664 (9th Cir. 1997). See also Bunting v. Sun Co., 643 A.2d 1085, 1086 (Pa.Super. 1994) ("In order to prove a claim of unseaworthiness under federal maritime law, a plaintiff must show that the unseaworthy condition of the vessel was the proximate, or direct, and substantial cause of his or her injuries.").

> [E]xamination of a great many personal injury cases in which claims of unseaworthiness were presented leads to the conclusion that those cases are of two categories, both of which fit this general definition. One is where the shipowner, having knowledge – actual or constructive – that certain activity will occur, is imposed with an absolute duty of supplying equipment for permitting the conduct and accomplishment in reasonable safety of that activity....The other category is where the equipment actually

[3] Although the present action has been brought in a state court, liability must be determined according to federal, maritime law. Klineburger v. Maritrans, 591 A.2d 314, 315 (Pa.Super. 1991) app. den., 529 Pa. 635, 500 A.2d 954 (1991), cert. den. 503 U.S. 1001 (1992) (citations omitted).

> supplied by the owner for doing the ship's work proves incapable of performing its function in the manner for which it was designed.

Canty v. Sun Transport, Inc., 620 A.2d 1, 3 (Pa.Super. 1992) (citation omitted). "The condition of unseaworthiness may arise from the 'existence of a defective condition, however temporary, on a physical part of the ship.' Ribitzki, 111 F.3d 664." Pappas, 2000 U.S. App. Lexis 12443, at *13. See also Reyes v. Delta Dallas Alpha Corp., 199 F.3d 626, 630 (2nd Cir. 1999) (*[U]nseaworthiness may be found as to a transitory condition.").

What is currently in dispute is whether the deck on which Foster slipped was reasonably fit for its intended use, as he essentially alleges that the ice which formed on the deck rendered it incapable of functioning in the manner in which it was designed. Maritrans does not dispute that there was ice on the tug's deck, but, rather argues that ice is a condition which commonly occurs on the decks of vehicles underway in freezing weather, and that the presence of such ice does not automatically render a vessel unseaworthy.

We agree. A ship does not have to be "accident-free," but must only be reasonably fit for its intended use. Pappas, 2000 U.S. App. Lexis 12443, at *12 (citing Mitchell, supra).

> Applying the foregoing doctrine, courts have consistently held that the mere presence of rain water, snow or sleet upon the deck or other exposed areas of a vessel does not render the vessel unseaworthy or create a condition requiring the owner to take corrective measures. Such conditions are reasonably expectable and unavoidable incidents of shipboard life, and unless the working surfaces of a vessel are found to be unreasonably slippery, the shipowner is not liable for breach of his warranty of seaworthiness.
>
> A seaman is not absolutely entitled to a deck that is not

> slippery. He is absolutely entitled to a deck that is not unreasonably slippery. It seems only fair that men who make their livelihood on the water can be expected to cope with some of the hazardous conditions that must prevail even on a seaworthy vessel.

Tate v. A/B Svenska Amerika Linein, 331 F.Supp. 854, 857-858 (E.D.La. 1970) (citing Colon v. Trinidad Corporation, 188 F. Supp. 97 (S.D.N.Y. 1960)). In Tate, a longshoreman slipped on a wet deck surface and contended that the slippery condition rendered the vessel unseaworthy. Id. at 856. The United States District Court refused to find the vessel unseaworthy. Id. at 856. The United States District Court refused to find the vessel unseaworthy on the ground that the longshoreman had failed to prove that the presence of rainwater on the deck was not an "unavoidable normally and reasonably expectable condition, or that it rendered the deck so unreasonably slippery that the vessel was not reasonably fit for use." Id. at 858.

Similarly in Connorton v. Harbor Towing Corporation, 237 F.Supp. 63 (D. Md. 1964), affirmed 352 F.2d 517 (4th Cir. Md. 1965), a seaman alleged that ice on the deck of his vessel rendered it unseaworthy. The court found that:

> As a practical matter, it would be impossible to maintain an ice free deck while operating at sea in freezing weather where the slightest ocean spray can create sheets of ice on deck. ... Given the freezing weather and the inevitability of ocean spray, [the vessel's deck] were reasonably fit for the purpose for which there were to be used.

Id. at 65 (citations omitted).

With the guidance of the above-cited cases, and reviewing the evidence in a light most favorable to Foster, as verdict winner, we find that he failed to prove that the presence of ice on the tug's

deck rendered it unseaworthy. Therefore, it was error for the trial court to refuse to grant judgment notwithstanding the verdict on this issue. Rohm & Haas Co., supra. In light of this decision, it is not necessary for us to address Maritran's remaining appellate arguments.[4]

Accordingly, we reverse that portion of the December 11, 2000 entry of judgment in favor of Foster pertaining to the damages awarded by the May 2, 2000 jury verdict, and remand with directions to enter judgment notwithstanding the verdict in favor of Maritrans. As we previously noted, Maritrans does not dispute the entry of judgment in favor of foster pertaining to the trial court's November 28, 2000 order awarding maintenance and cure. Therefore, we affirm the portion of the December 11, 2000 entry of judgment as it pertains to the November 28, 2000 order.

Reversed in part, and remanded. Affirmed in part. Jurisdiction relinquished.

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[4] Maritrans also asserted on appeal that: The trial court erred in failing to enter judgment notwithstanding the verdict where the evidence failed to disclose that Foster slipped on contemporaneously formed ice, which condition absolves Maritrans from liability as a matter of law under the hills and ridges doctrine; the trial court erred in failing to grant a new trial on the issue of unseaworthiness on the ground that the trial court failed to properly charge the jury on the effect of the presence of naturally occurring ice on the deck of a vehicle in transit and the unavoidable exposure of a vessel to weather, as those conditions pertain to the doctrine of unseaworthiness; and the trial court erred in failing to grant a new trial on the ground that the trail court failed to properly charge the jury on the causation standard applicable to Foster, as a seaman, for contributory negligence.

Judgment entered,

s/ David A. Szewczak, Esq.
Prothonotary

Date: JAN 09 2002

# Appendix "B"

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

| | |
|---|---|
| ROBERT C. FOSTER AND ANN I, FOSTER, his wife | : No. 53 EAL 2002 |
| Petitioners | : Petition for Allowance of Appeal : from Order of the Superior Court |
| v. | : |
| MARITRANS, INC., MARITRANS GP, INC. AND MARITRANS OPERATING PARTNERS, L.P., | : Entered November 20, 2002 |
| Respondents | |

ORDER

PER CURIAM

AND NOW, this 20th day of November, 2002, the Petition for Allowance of Appeal is hereby denied.

TRUE COPY FROM RECORD

Attest: NOV 20 2002

s/ Patricia Johnson
Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania
Eastern District